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No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

THE MIAMI TRIBE OF OKLAHOMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Claims.

OPINIONS BELOW

The opinion of the Indian Claims Commission (App., *infra*, pp. 31–55) is reported at 6 Ind. Cl. Comm. 552. The opinions of the Court of Claims (App., *infra*, pp. 12–30) are reported at 281 F. 2d 202.

JURISDICTION

The judgment of the Court of Claims was entered July 15, 1960 (App., *infra*, pp. 12, 29). A timely motion for rehearing was overruled on November 2, 1960. An extension of time to April 1, 1961, within which

to apply for a writ of certiorari, was granted by the Chief Justice on February 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s.

QUESTION PRESENTED

Whether, under the Indian Claims Commission Act, an Indian tribe is now entitled to additional compensation, equivalent to interest, because payments by the United States provided by treaty for the surrender of tribal land and other rights were made in installments rather than as a lump sum at the time of the treaty.

TREATY PROVISION INVOLVED

Article 3 of the Treaty of 1854 with the Miami Tribe provides, in relevant part (10 Stat. 1094–1095):

> In consideration of the cession hereinbefore made, the United States agree to pay to the Miami tribe of Indians the sum of two hundred thousand dollars, in manner as follows, viz: twenty annual instalments of seven thousand five hundred dollars each, the first payable on the first day of October, one thousand eight hundred and sixty, and the remainder to be paid respectively on the first day of October of each succeeding year, until the whole shall have been paid; and the remaining fifty thousand dollars shall be invested by the President in safe and profitable stocks, the interest thereon to be applied, under his direction, for educational purposes, or such objects of a beneficial charter, for the good of the tribe, as

> may be considered necessary and expedient; and hereafter, whenever the President shall think proper, the sum thus provided to be invested, may be converted into money, and the same paid to the tribe in such manner as he may judge to be best for their interests. * * *

Article 4 of the treaty is printed in the Appendix, *infra*, pp. 56–59.

STATEMENT

The Court of Claims has reversed a holding of the Indian Claims Commission rejecting claims of the Miami Tribe, and directed entry of judgment for $413,900, Judge Whitaker and Chief Judge Jones dissenting. The facts relevant to the question stated above may be summarized as follows:

By treaty in 1854 the Miamis ceded some 254,000 acres of land in Kansas to the United States for a stated consideration of $200,000 payable in 20 annual installments of $7,500 each and a lump sum of $50,000 to be invested for the benefit of the Tribe (see *supra*). In this case, the Tribe claimed before the Indian Claims Commission that the consideration was so inadequate as to warrant recovery under the Indian Claims Commission Act, 25 U.S.C. 70a (3) and (5). The Commission rejected this claim, finding that the land had a fair market value in 1854 of $1.25 per acre, or $317,697.93, and that the consideration of $200,000 was not unconscionable under the circumstances. The Court of Claims affirmed the $1.25 valuation but reversed the finding that the consideration was not unconscionable. It found that it was necessary to discount the $200,000, actually paid in

accordance with the terms of the treaty, because the payment of that sum in installments resulted in delay. The court valued the payments at $121,900 as of the treaty date (1854), held this amount unconscionably small, and ordered judgment for an additional $195,000.

The same discount process was used on another claim. By an 1826 treaty, the Miamis had been promised annuities which the Court of Claims held were permanent and amounted to $26,500 a year. To eliminate these charges, the treaty of 1854 provided for payment of a $25,000 annuity in 1854 and 1855, and in addition for payment of a consideration of some $421,000. The then value of a permanent annuity of $26,540, using a 5% interest rate, was $530,800. The Commission held that the consideration was not so inadequate as to be unconscionable.[1]

The Court of Claims reversed. It valued the consideration paid by the United States at $412,600 by the same discount process, and held this amount to be unconscionably small. Part of the $421,000 payment, *supra*, was to be made by establishing a trust fund, if the Indians desired it, which was to earn 5% interest (*infra*, p. 24). The treaty provided that this fund was to be

[1] The Commission said (*infra*, p. 40):

> In satisfaction and release of a claim of indefinite value, the parties agreed upon a specific sum which was forthcoming at a time when the tribe was passing from a communal mode of living to that of individual allotments and was faced with the expense incident thereto. Under the circumstances disclosed, we can not say that the $471,438.68 consideration was unfair or dishonorable, or that it fell so far short of the true value of the annuities commuted as to be unconscionable.

created on July 1, 1855, which was a year and one month after the treaty was signed by the Indians. The Court of Claims discounted this fund for 13 months, referring to it as "such delayed investment" (*infra*, p. 24). Most of the balance was payable, as the Court of Claims says, "in five annual installments of $31,739.11, without interest." This the court discounted at 5% to reduce the amount it considered to have been paid by $21,000. The court also valued the second of the $25,000 payments at $23,700 because of one year's delay.

REASONS FOR GRANTING THE WRIT

This case, together with *United States* v. *The Crow Tribe of Indians* and *United States* v. *The Absentee Shawnee Tribe of Oklahoma*, in which petitions for writs of certiorari are being filed at the same time as this petition, represent different applications of the same basic ruling of the Court of Claims. This ruling is incorrect and sharply conflicts with established principles as to interest against the government. The departure by the court below from these settled rules is important to the remaining cases under the Indian Claims Commission Act and also to the general field of claims against the United States. Review by this Court is fully warranted.

1. Since earliest days the rule has been followed, without exception, that, apart from claims under the Fifth Amendment, claims against the United States do not bear interest unless there is statute or contract so providing, and Congress has at no time generally provided for interest on all claims. See *Smyth* v.

United States, 302 U.S. 329, 353, and cases there cited. The nature of interest in this setting was explained by Attorney General Wirt as being "in the nature of damages for withholding money which the party ought to pay, and would not or could not." 1 Op. A.G. 268. The rule applies "whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application." *Angarica* v. *Bayard*, 127 U.S. 251, 260; *United States* v. *Hotel Co.*, 329 U.S. 585; *United States* v. *N. Y. Rayon Co.*, 329 U.S. 654, 659–660.

Indian cases form no exception. One of the most recent applications of the rule is *United States* v. *Tillamooks*, 341 U.S. 48, in which this Court reversed an order to pay interest on a claim of an Indian tribe arising under a special jurisdictional Act. Prior to the present case, the rule had been uniformly applied both to Indian claims under special jurisdictional Acts and to those asserted under the Indian Claims Commission Act, *e.g.*, *Cherokee Nation* v. *United States*, 270 U.S. 476, 490 (holding that interest could not be allowed for a delay of Congress in appropriating an amount due under an agreement); *Loyal Creek Indians* v. *United States*, 118 C. Cls. 373, 383; *Quapaw Tribe of Indians, et al.* v. *United States*, 128 C. Cls. 45; *Kiowa, Comanche and Apache Tribes* v. *United States*, 143 C. Cls. 534. In the case of Indian claims there is additional reason for denying interest. Indian tribes enjoy the same sovereign immunities as does the United States. *United States* v. *U.S. Fidel-*

ity Co., 309 U.S. 506. In 1822 the Attorney General disallowed interest on claims asserted against the Creek Nation which had been assumed by the United States, saying (1 Op. A.G. 550, 551):

> 2. The claim ought to be liquidated against the United States exactly on the principle that it would be liquidated against the Indians; and it is believed that a claim of interest against a nation of Indians, under circumstances like these, would be unprecedented.[2]

2. However formulated, it is plain that the Court of Claims' holding is that additional charges are imposed upon the United States because payments were delayed beyond the time the debt was acknowledged. The opinion refers to the establishment of the trust fund as "delayed" investment. App., *infra*, p. 24. Except for changes in the purchasing power of the dollar (which no one considers should be the basis of recovery), the value of the dollar consideration is the same in 1854, 1884, or even the present time, except for damages for delay in payment, *i.e.*, interest.[3] If

[2] He also stated (p. 551):

> 3. Interest is not a thing of course; it is no part of the debt, nor is it a necessary consequence of the debt. By many nations it is not allowed at all; and by those whose laws allow it among individuals, it is not allowed in every case, but only where the circumstances of the case call for its allowance, as a matter of equity in the particular case. These principles are nowhere more clearly stated, nor more ably illustrated, than in Mr. Jefferson's letter to Mr. Hammond. (State Paper, vol. 1, p. 304.)

[3] While is does not appear on the face of the opinion, interest was in fact compounded in this case because of the table used by the Court of Claims. This was clearly erroneous. *Cherokee Nation* v. *United States*, 270 U.S. 476, 490; *United States* v. *Isthmian S. S. Co.*, 359 U.S. 314.

nothing at all had been paid by the United States, the rule excluding interest would indisputably limit the consideration for the 1854 cession to the $200,000 unpaid. *United States* v. *Tillamooks,* 341 U.S. 48. But because, under the terms of the treaty, full payment was delayed, the Court of Claims, by allowing only a $121,900 credit, has made the United States pay an additional $78,100 in the case of the Miami 1854 cession. Applied to the facts of the *Tillamooks* case, this ruling would mean that, if part payment had been made in 1900, it would have been discounted to 1855, producing the same result as if interest were added since 1855—thus imposing greater liability when the United States has made part payment than when it has made no payment.[4]

The *Crow, Miami,* and *Shawnee* decisions show that the Court of Claims has applied this discounting process mechanically to all three cases as "a matter of law" (*infra,* p. 19). The holdings cannot be explained as constituting simply a conclusion as to "fair and honorable dealings" or "unconscionable" transactions on the particular facts of each case. Moreover, the Indian Claims Commission Act provides that the Commission "shall make appropriate deductions for all payments made by the United States on the claim * * *," 25 U.S.C. 70a. No discre-

[4] To support its result, the Court of Claims charged the government with inconsistency because of the process of computing the lump sum value of the permanent annuity. App. *infra,* p. 19. But perpetual annuities have the same value regardless of what has been paid in the past. The same result would be reached in 1854, 1874, or at the present time. No element of delay in payment is involved in such cases.

tion in this regard is vested in the Commission, or in the Court of Claims on appeal. But the holding here allows the United States only $121,900 credit for the $200,000 it paid on the claim for cession of lands and only $412,600 credit for the $421,000 paid for commutation of the annuities. In addition, under the Act, offsets are allowed for certain items spent for the benefit of the tribes. 25 U.S.C. 70a. On the court's reasoning, the value of these offsets could also be discounted as of the date the obligation arose. This would greatly affect the liabilities of the United States. See, *e.g.*, *Choctaw Nation* v. *United States*, 91 C. Cls. 320. Offsets have always been computed without regard to when the payments were made. See, *e.g.*, *Quapaw Tribe of Indians, et al.* v. *United States*, 128 C. Cls. 45.

3. The question is important. The novel rule declared by the court below embraces almost every claim now pending under the Indian Claims Commission Act; at least some portion of the payment made by the government in the past was paid in installments in the case of almost all claims.[5] In addition, as indicated above, the recurring problem of offsets may well be affected.

The future effect of this ruling is also significant. The Court of Claims, under 28 U.S.C. 1505, has been vested with permanent jurisdiction as to Indian claims, without the broad authority given the Indian Claims Commission. The present ruling could be

[5] At the end of the fiscal year 1960, there were 463 cases pending before the Commission, the amount claimed being impossible to estimate. However, in that fiscal year, final judgments in 12 cases totalled $37,300,000.

asserted to apply in claims submitted to that court and to counterclaims and setoffs in such cases. 28 U.S.C. 2508.

Moreover, the reversal of the long-held rule against interest would certainly lead those Indian Tribes which have not enjoyed the benefits of the new rule in adjudication of their claims in the past, either by the Commission or under special jurisdictional acts, to seek additional legislation to permit relitigation of such claims. The general objective of the Indian Claims Commission Act, to settle once and for all these Indian claims, could thus be frustrated.

Especially in view of the history of the no-interest rule, *supra*, it will surely be argued that the new discount rule should equally apply to non-Indian cases. Thus, on the facts set forth in *United States* v. *Hotel Co.*, 329 U.S. 585, it would be argued that the $867,682 to be paid under the judgment of 1946 would have, under the theory of the Court of Claims' new rule, a lesser value in 1943 when government agents took over the hotel—hence, that the consideration provided by the contract was not paid in full. The same rule would also affect government contracts providing for installment payments or cases of postponement in payments because of delay in passage of appropriation acts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
Attorney.

MARCH, 1961.

APPENDIX A

In the United States Court of Claims

Appeal No. 2–59

(Decided July 15, 1960)

THE MIAMI TRIBE OF OKLAHOMA, ALSO KNOWN AS THE MIAMI TRIBE AND HARLEY T. PALMER, FRANK C. POOLER AND DAVID LEONARD, AS REPRESENTATIVES OF THE MIAMI TRIBE, AND OF ALL THE MEMBERS THEREOF, APPELLANTS; IRA SYLVESTER GODFROY, ET AL., ON RELATION OF THE MIAMI INDIAN TRIBE AND MIAMI TRIBE OF INDIANA, AND EACH ON BEHALF OF OTHERS SIMILARLY SITUATED AND ON BEHALF OF THE MIAMI INDIAN TRIBE AND VARIOUS BANDS AND GROUPS OF EACH OF THEM, COMPRISING THE MIAMI TRIBE AND NATION, APPELLANTS v. THE UNITED STATES, APPELLEE

Mr. Edwin A. Rothschild for the appellants Miami Tribe of Oklahoma, et al. *Messrs. Edward P. Morse* and *Louis L. Rochmes* were on the briefs.

Mr. Walter H. Maloney for the appellants Ira Sylvester Godfroy, et al. *Mr. James N. Berry* was on the brief.

Mr. W. Braxton Miller, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for the appellee.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This is an appeal from a decision of the Indian Claims Commission (hereinafter called the Commission). The appellants, the Miami Tribe of Oklahoma (hereinafter called the Miami Tribe) and the Miami Tribe of Indiana (herein

referred to as the Indiana Miami) filed claims under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. §§ 70–70v, to recover additional compensation for certain lands which the Miami ceded to the United States by the Treaty of June 5, 1854, 10 Stat. 1093. Under that treaty, the Miami ceded all of their land located on the eastern border of Kansas, with the exception of 70,640 acres. The consideration to be paid to the Miami Tribe was described as $200,000, of which $50,000 was to be invested by the President of the United States for the benefit of the Miami Tribe, with the remainder to be paid to the Miami Tribe in twenty annual installments of $7,500, starting in 1860. No part of the consideration was to be paid to the Indiana Miami. The treaty also provided for commutation of tribal annuities which were payable to the Miami under earlier treaties. Payment for the commutation was to be made to both the Miami Tribe and the Indiana Miami.

The appellants claimed that the consideration they received in 1854 for their lands in Kansas and for the commutation of their annuities was unconscionable or inconsistent with fair and honorable dealings. They also claimed that they were entitled to be paid for more land in Kansas than they actually owned, since the United States had promised to give them more land than it did give them. Finally, they claimed interest on certain sums which they had been paid by the United States in 1891 to reimburse them for amounts which were rightfully theirs but which had been paid to other parties. The total amount claimed by the appellants was $1,092,799.28.

The Commission decided that neither appellant was entitled to relief, in an opinion rendered on July 14, 1958, reported at 6 Ind. Cl. Comm. 552. The Commission made findings of fact which are reported at 6 Ind. Cl. Comm. 513.

Prior to 1846, all of the Miami Indians lived in Indiana. In that year, pursuant to a treaty signed on November 28, 1840, 7 Stat. 582, a group of the Miami Indians moved to Kansas. The Miami Tribe are the descendants of those Miami who went to Kansas and remained there (and later moved to Oklahoma), while the Indiana Miami are the descendants of the Miami who remained in Indiana, or who went to Kansas but later returned to Indiana. An issue in

the case is whether the Indiana Miami are entitled to participate in any recovery for inadequate consideration received for the Kansas lands ceded to the United States in 1854. It is agreed that the Indiana Miami will participate in any recovery for inadequacy of consideration paid for the 1854 commutation of annuities. It must first be determined, however, whether there is to be any recovery. The Indiana Miami join with the Miami Tribe on issues relative to liability.

The issues in this case are (1) whether the consideration paid by the United States for the Kansas land ceded to it in 1854 was so inadequate as to entitle the Miami to recover under section 2(3) or 2(5) of the Indian Claims Commission Act, 25 U.S.C. §§ 70a (3) and (5); (2) whether the Miami were entitled in 1854 to be paid for 500,000 acres of Kansas land, rather than for the 324,796.88 acres which they actually owned, on the grounds that they had moved to Kansas on the understanding that the United States would give them 500,000 acres there; (3) whether the consideration paid for the commutation of certain annuities was inadequate; (4) whether the Miami are entitled to recover interest on sums which were paid to them in 1891 to replace allotments and payments which had been wrongfully made in 1858 and 1859 to spurious or unqualified Miami Indians; and (5) whether the Indiana Miami are entitled to share in recovery for the Kansas land.

The Commission found that the land ceded by the Miami on June 5, 1854, had a fair market value on that date of $1.25 per acre, or a total value of $317,697.93. It concluded that the Miami had received $200,000 therefor, and that this amount was "not an unconscionable consideration under the facts and circumstances surrounding its purchase on that date, and that petitioners are not entitled to relief under section 2(5) [the 'fair and honorable dealings' section] of the Indian Claims Commission Act." 6 Ind. Cl. Comm. 551. The Commission further concluded that the consideration paid the Miami for the commutation of their annuities in 1854 was not unfair, dishonorable or unconscionable; that the Miami were not entitled to recover for the number of acres by which the acreage they actually received under the 1840 treaty was less than 500,000, the number of acres the

Miami claim they had been promised; and that the Miami were not entitled to recover the interest they claimed on the funds which were misapplied in 1858 and 1859. It also held that the Indiana Miami had no interest in the Kansas land.

(1) THE ADEQUACY OF THE CONSIDERATION PAID FOR THE KANSAS LANDS UNDER THE 1854 TREATY

The Commission found that the Kansas lands were worth $1.25 per acre, $317,697.93 in total; the Miami claim they were worth not less than $2.40 per acre, $609,980 in total. The Commission concluded that the Miami received $200,000 for their lands; the Miami contend they received only $121,974.23. The Commission held that consideration of $200,000 for land worth $317,697.93 was not unconscionable; the Miami contend that since they received only $121,974.23 for land worth at least $609,980, they are entitled to recover $488,005.77, but they also argue that even if the Commission was correct about the values of the land and of the consideration, such consideration was unconscionable, or inconsistent with fair and honorable dealings.

In considering the controversy over the value of the land, it must be borne in mind that this court's jurisdiction on appeal is limited to determining

> whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. 25 U.S.C. § 70s(b).

The requirement that the Commission's findings of fact be "supported by substantial evidence" means that they must be supported by evidence which is substantial when whatever in the record which fairly detracts from its weight is taken into account. *The Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 603–614; *The Prairie Band of Potawatomi Indians* v. *United States*, Appeal No. 2–57, decided July 16, 1958, 143 Ct. Cl. —, 165 F. Supp. 139 (slip opinion, p. 21).

We think that, in this case, the Commission's finding as to the value of the land was supported by substantial evidence.

In 1856 the land was surveyed and classified as 13.3% Class I land (bottom, terrace and upland, with alluvial and dark residual prairie soil, having a slope of two percent or less), 65.7% Class II land (land with dark residual prairie soil over a clay subsoil, having slopes up to 12%), and 21% Class III land (land unsuited to agriculture, but which produces a good prairie hay). The tract as a whole had a 40% timber coverage of walnut, hickory, elm, sugar maple and other hardwoods on the uplands and sycamore along the streams. The coverage of the ceded lands was only 15%. The Osage River and its tributaries flow generally south and southeast through the tract. The principal use for this land appears to have been for small-scale farming.

Two expert witnesses testified on behalf of the Government. They based their opinions as to the value of the Kansas land primarily upon a comparison with a 350,000-acre tract of land in Missouri lying just to the east of the Miami lands, across the Kansas-Missouri border. The Government's expert Hall noted that similar and contiguous land in Missouri had been on the market, at $1.25 per acre, for years, but that it had not been sold. He derived a value of 35¢ per acre for the Kansas land, by taking into account deductions for advertising, delay in realizing upon investment, costs of financing transportation and other improvements, and similar items. The Government's witness Murray valued the Kansas land at 50¢ per acre. He found that the Kansas land was quite comparable to the Missouri tract, and noted that only 10% of the Missouri lands had been sold between 1843 and 1846, but that a sharp increase in sales occurred in 1853–1854. It appears that another 10% was sold in 1854, but that about 252,000 of the 350,000 acres, or 72% of the original Missouri tract, remained unsold in June 1854. It appears that there were 22,722,000 acres of unsold public lands in Missouri in June 1853, and that over 20,000,000 acres remained unsold in June 1854. Under the Pre-emption Act of 1841, 5 Stat. 453, settlers could enter upon 160-acre tracts of public lands and obtain preferential rights to buy

the land at $1.25 per acre. Military scrip and warrants applicable to land purchases were made assignable in 1852. They were credited at $1.25 for an acre of selected land, but could be obtained in 1854 for about $1.10 each. Public land in Kansas was, in general, held off the market until after July 1, 1857, because, it appears, the general land market in the area was saturated.

The appellants object to the finding that the general land market was saturated. They say that the availability of land in Missouri did not "saturate" the land market of eastern Kansas, and cite our statement in *Miami Tribe of Oklahoma* v. *United States*, Appeal No. 2-58, decided July 13, 1959, — Ct. Cl. —, 175 F. Supp. 926, slip opinion, p. 40, that material with respect to land available *throughout the United States* at the time of cession had no relevancy to the issue of value in that case. It is true that the amount of land available throughout the United States is irrelevant, but in this case we are concerned with evidence of the availability of large quantities of very similar land immediately adjoining the tract in question.

The Miami rely primarily upon a comparison between their Kansas lands and a 208,000-acre tract of land, lying immediately north of their own land, which was ceded by the Peoria and other Indians to the United States on May 30, 1854, 10 Stat. 1082. The Peoria tract was placed on the market in 1857, at an average appraisal of $1.66 per acre, and was completely sold within three weeks, for an average price of $1.67 per acre. The Miami argue that this price of $1.67 was considerably below the realistic market value of the land. They say the price was low because no competition was allowed, since most of the acreage was preempted by real or spurious settlers and their assignees. They point to the rapidity with which the land did sell, and to the average profits upon resale of at least 65¢ above appraisal.

There is, however, a significant difference between the Miami and the Peoria tracts which supports a conclusion that the Miami lands were worth less. The location of the Peoria tract was considerably more advantageous than that of the Miami tract, since it was nearer to Kansas City and Leavenworth, as well as to the Santa Fe Trail. At the time with which we are dealing here, such differences in location,

even if they do not seem very great by our current standards of distance, could have had significant effect upon land value. As the appellants note, certain lands ceded by the Iowa and Delaware Indians were appraised at higher values than the Peoria lands, "presumably because of advantages arising from their proximity to the Missouri and Kansas Rivers, the only navigable waterways."

Further, the sales of the Peoria lands did not take place until 1857. While these sales were made only three years from the time of the Miami cession, this was a turbulent and significant period in the history of Kansas, and we cannot say that conditions in 1857 were sufficiently comparable to those in 1854 to require a finding that the 1857 sale of the Peoria lands determines their 1854 value. While the Commission would have been justified in placing more weight on the evidence of the market value of the Peoria lands, we cannot say that its failure to do so was erroneous.

The Miami also point to certain sales of preemption claims to land within the Miami tract itself which were made in 1857 for $5.00 to $7.00 per acre and to sales of nearby trust lands for the Iowa and Delaware tribes for an average of $2.35 per acre in 1857 and $2.00 in 1867. Again, while we might have given more weight to these factors than did the Commission, we cannot say, in view of the differences in time and location, which may well have been quite significant, that the Commission erred in discounting their importance.

The appellants complain that the Commission erred by relying on the "wholesale theory" to value the Kansas land. We note that the Commission, in its opinion, indicated that it thought the valuation of the Miami land should take into consideration the value of the tract if it were to be sold as a whole, rather than the total of the values of such smaller tracts into which it might be divided. We have disapproved this "wholesale theory". *The Miami Tribe of Oklahoma* v. *United States*, *supra*, 175 F. Supp. 926, 953, slip opinion pp. 43–44. It does not appear, however, that the Commission has based its finding of value in this case upon this theory.

We conclude, therefore, that the Commission's finding that the Miami lands in Kansas were worth $1.25 per acre in 1854

is supported by substantial evidence. The value of the 254,158.34 acres which were ceded was $317,697.93.

It must next be determined how much the Miami received in 1854 for the cession.

The Commission erred as a matter of law when it concluded that the Miami Tribe received $200,000. It is true that the treaty described the consideration as $200,000, but the treaty also prescribed the method of payment. The value of consideration received, as well as the value of land ceded, must be determined as of the date of cession. The payment of $50,000 to be held at interest had a treaty-date cash value of $50,000. But $150,000 payable in twenty yearly installments of $7,500 commencing six years after the treaty date had a treaty-date value of only $71,974.23, which was the then present value of the right to receive such payments, on standard annuity tables, computed at a 5% interest rate. The treaty-date value of the consideration which the Miami Tribe received was therefore $50,000 plus $71,974.23, or $121,974.23.

The Government argues that to so hold would be contrary to what this court said in its opinion in the earlier case of *The Miami Tribe of Oklahoma* v. *United States*, *supra*, — Ct. Cl. —, 175 F. Supp. 926, 955–956, slip opinion pp. 47–48, to the effect that the payments on account of a limited annuity which had been allowed as payments on the claim in *The Quapaw Tribe of Indians* v. *United States*, 1 Ind. Cl. Comm. 644, 652, aff'd in part and rev'd in part, 128 Ct. Cl. 45, were "probably installments of a stated purchase price and as such, to the extent actually paid, represented the consideration for the cession and payments on the claim." That statement was made when the court did not have the issue before it, and does not have the force of a holding. After considering the question as it is presented in this case, we cannot say that the receipt of an undertaking to pay $7,500 a year for 20 years starting in six years amounts to a payment of $150,000. If the Indians were in the position of selling such an undertaking, the Government would be the first to point out that it was worth only its capitalized value. In fact, this is the very argument which the Government presents in this case in urging that its payment for the 1854 commutation of the Miami's annuities was adequate.

The Miami received $121,974.23 for land which the Commission found to be worth $317,697.93. This is unconscionable consideration. It is only 38% of the value of the land. It is true that there is no exact dividing line between what is unconscionable and what is not. The disparity between the price paid and the fair market value of the land must be very great. We think that the Commission was correct when it said in this case that payment of less than half the true value is unconscionable. The Miami are thus entitled to recover for the value of their land ($317,697.93), less the payment they received ($121,974.23), which difference is $195,723.70.

(2) WHETHER THE MIAMI SHOULD HAVE BEEN PAID FOR 500,000 ACRES IN KANSAS

The Miami claim that they should recover also for the difference between 500,000 acres, the number of acres in Kansas which they claim they were promised when they agreed to move west, and 324,796.88 acres, the amount of Kansas land they actually received. We cannot find any promise that the Miami would be given 500,000 acres in Kansas.

In 1833, when the Miami reservations in Indiana still included almost 1,000,000 acres, Government representatives told the Indians that the President was willing to give them, in exchange for their Indiana lands, as much land west of the Mississippi as they then had in Indiana. The Miami informed the Government representatives that they did not want to give up their reservation, and no agreement was reached.

Again in 1834 the Government attempted to obtain a cession of the Indiana lands, but the Secretary of War directed the Miami agent to offer only 300,000 acres in the west, and to give 800,000 acres only "in the last resort . . . if nothing short will satisfy them." By a treaty signed October 23, 1834, 7 Stat. 458, the Miami ceded 250,560 acres of their Indiana land, for a recited consideration of $208,000 but there was no provision made for land in the west.

It was in Article 10 of the treaty of November 6, 1838, 7 Stat. 569, by which treaty the Miami ceded more than 200,000 acres for a recited consideration of $335,680, that

the United States first agreed to possess the Miami with land west of the Mississippi. That Article provided:

> * * * the said country shall be sufficient in extent, and suited to their wants and condition and be in a region contiguous to that in the occupation of the tribes which emigrated from the States of Ohio and Indiana * * *.

No mention is made of 500,000 acres, or of a number of acres equal to those given up in Indiana. No western lands were given to the Miami under this treaty, but negotiations between the Government's Indian Agents and the Miami continued.

On November 28, 1840, Government representatives and the Miami concluded a treaty at the Forks of the Wabash, in Indiana, whereby the Miami ceded their remaining Indiana lands, about 491,000 acres, for a recited consideration of $550,000. 7 Stat. 582. Article 8 provided:

> It is hereby stipulated, that the Miami tribe of Indians shall be removed to the country assigned them west of the Mississippi, within five years from this date; * * *.

When the treaty was submitted to the Senate for ratification, it was amended, on February 25, 1841, by the addition of an Article 12, which read:

> The United States hereby stipulate to set apart and assign to the Miamies, for their occupancy west of the Mississippi, a tract of country bounded on the east by the State of Missouri, on the north by the country of the Weas and Kaskaskias, on the west by the Pottawatomies of Indiana, and on the south by the land assigned to the New York Indians, estimated to contain five hundred thousand acres. 7 Stat. 585.

The Miami subsequently, on May 15, 1841, assented to the amendment. 7 Stat. 585.

We cannot find, nor are we cited to, any evidence that the Government had promised to give the Miami land in Kansas equal in extent to the land they gave up in Indiana. What was promised was described in the 1838 treaty as country "sufficient in extent, and suited to their wants and condition."

There is a letter, dated May 29, 1854, from some Miami representatives to Commissioner Manypenny, where the Indians state:

> We were promised previous to our removal from Indiana, at the formation of our last treaty, a country west of large extent equal if not greater in quantity to the amount we disposed of, which was some 1½ million of acres. We were promised a country sufficient in extent to keep off at a distance the bordering and predatory tribes. We are fully of the opinion that these promises and pledges on the part of our Great Father was remembered when the estimated number of acres were designated in the amendment and ratification of our last treaty. They gave us the precise number of acres we sold in Indiana. We were promised a more extensive country, but an equal amount seemed to be the amount decided on by Congress. Their manner of designating the boundaries, not knowing the locality of the lands of the bordering tribes, is the cause of the unintentional deficiency of the stipulated treaty.

We do not think that the language of the 1840 treaty amounted to an engagement to assign to the Miami anything more than the area which was therein described by its boundaries. The mention of the estimated acreage was no more than it appears to be, a guess as to the size of the area which was to be assigned to the Indians.

Since, therefore, there was no promise to give the Indians 500,000 acres in Kansas, there was no shortage of acreage in the Kansas lands, and the Miami are not entitled to recover for the alleged shortage.

(3) THE COMMUTATION OF ANNUITIES

We next consider the commutation of the Miami annuities which took place under the 1854 treaty. We think that the consideration which the Miami received for the commutation of the annuities which the Government was obligated to pay, was inadequate. The annuities due the Miami in 1854 totaled $26,540 per year. It is agreed that the present cash value of a permanent annuity of $26,540, based on an interest rate of 5%, is $530,800. The Government contends, and the Indian Claims Commission agreed, that the Miami annuity of $25,000 under the treaty of October 23, 1826, 7 Stat. 300, was not a permanent annuity, since it is provided for in the treaty as follows:

> * * * a permanent annuity of twenty-five thousand dollars shall be paid to them (the Miamis), as long as

they exist together as a tribe; which several sums are to include the annuities due by preceding treaties to the said tribe.

We think that such an annuity has the value of a permanent annuity. The Government asserts that, because Congress might have been justified in declaring the tribal existence of the Miami terminated in 1873, the annuity's value in 1854 was that of a twenty-year annuity. It is hardly conceivable that the United States had the power, by its unilateral act, in effect to nullify this annuity. As for the tribe dissolving itself, it would not be expected that this relatively small band of Indians would purposely disable themselves from receiving their annuity. It was the policy of the United States at this time to encourage the assimilation of the Indians into the society, and this policy would hardly have been served by a provision which would end Indians' annuities upon their taking a step toward assimilation. The provision that the annuity, although permanent, be paid to the tribe as long as it existed together as a tribe presents a problem.

We must seek to give this treaty provision a meaning which will give effect to all of its language. "It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable." *Geofroy* v. *Riggs*, 133 U.S. 258, 270. "Now, it is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can properly be done; and thus to preserve the harmony of all the provisions." *Bend* v. *Hoyt*, 13 Pet. 263, 272. All words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *McDonald* v. *Thompson*, 305 U.S. 263, 266.

In order to give effect to the words "permanent annuity," the specification that payments be made to the tribe as long as it remained together as a tribe must be interpreted as a specification of the proper party to receive the annuity, rather than a limitation on its length. That is, the annuity was permanent, payable to the tribe so long as it existed together as a tribe, and payable thereafter to the various individual Miami.

This interpretation is strengthened by the fact that the various annuities which were consolidated by the 1826 treaty

had been described as "permanent" (treaties of August 21, 1805, 7 Stat. 91; September 30, 1809, 7 Stat. 113 and 115), "perpetual" (treaty of October 26, 1818, 7 Stat. 189, 191), and "forever" (treaty of August 3, 1795, 7 Stat. 49, 51). Also, the 1854 treaty described the annuity simply as "permanent." 10 Stat. 1096. We find, therefore, that the value of the annuities to which the Miami were entitled in 1854 was the value of a permanent annuity of $26,400, or $530,800.

We must next determine how much the Miami received for the commutation of these annuities. Article 4 of the 1854 treaty provided that a payment of $421,438.68 be made, $190,434.68 to the Western Miami and $231,004 to the Indiana Miami. However, the Miami were not to receive payments having a present value of $421,438.68. The Indiana Miami's $231,004 was to be invested for them at 5% starting July 1, 1855, which was one year and one month after the treaty date. The treaty date value of such delayed investment was $219,804.59.

Of the $190,434.68 payable to the Western Miami, only $31,739.11 was paid in 1854. The rest was payable in five annual installments of $31,739.11, without interest. The present value in 1854 of the installments was $137,411.30, plus the $31,739.11 actually paid in 1854, or a total of $169,150.41.

Annuity installments of $25,000 were also paid in 1854 and 1855. The 1854 payment had already been earned, however, and the 1854 value of the 1855 payment was only $23,708.50.

The total 1854 value received by the Miami for commutation of an annuity worth $530,800 was therefore $219,804.59, plus $169,150.41, plus $23,708.50, or a total of $412,663.50. This amount is approximately 78% of the annuity's value. The issue then is whether the payment to the Miami of only 78% of the value of their annuity constitutes unconscionable consideration or is inconsistent with the requirements of fair and honorable dealings.

The Government admits that the Miami were entitled to the annuity, and points to no factor which might have induced them to take less than the annuity was worth. The commutation was apparently done at the insistence of the United States. During the negotiations which took place in Washington, D.C., between George W. Manypenny, the Com-

missioner of Indian Affairs, and the Miami delegation, from May 23 to June 7, 1854, Commissioner Manypenny stated that the Government wanted to "blot out" the old annuities by making several large payments. One of the Miami delegates answered that his party did not want it that way, but wished the annuities to run on. We find no evidence that the Miami wanted the annuities commuted. Under such circumstances, we can think of no reason for their having taken less than the value of their annuities other than that they were less than completely aware of the meaning and methods of commutation, and were incapable of determining for themselves the value of the annuity. Under such circumstances, we think that payment of less than the true value of the annuities which the Miami were entitled to receive amounted to something less than fair and honorable dealings, and that the Miami are entitled to recover the difference between $530,800 (the value of their annuities) and $412,663.50 (the amount they actually received for the commutation of their annuities), which is $118,136.50.

It is conceded that the Indiana Miami are entitled to share with the Miami Tribe in this recovery, in the same proportions as their respective payments for the commutation as provided in the treaty. For the purpose of computing the proportion, we will use the figures as recited in the treaty, rather than the present values of the respective payments, since we think the recited figures are more likely to indicate the fractions into which the payment was intended to be split. The Indiana Miami are thus entitled to 54.8% of the recovery, which is $64,738.80, and the Miami Tribe are entitled to $53,397.70.

(4) CLAIM FOR INTEREST ON MISAPPROPRIATED FUNDS

A rider to the Appropriation Act of June 12, 1858, 11 Stat. 329, 332, provided that Miami annuities be paid to persons "of Miami blood" who had been excluded from annuities since 1846 and who were not included in the list of Miami compiled under the 1854 treaty. These persons were to be added to the list of Miami and be allotted 200 acres each in the Kansas reservation. Seventy-three persons were added to the Miami list under this Act, and they

were given lands and annuities. It was later found that these persons were not members of the tribe, nor entitled to share in its funds. In 1891 Congress determined that, under this Act, the United States had taken from the Miami Tribe without their consent the sum of $18,370.89 in October 1858, and lands worth $43,600.14 in November 1859, and it therefore appropriated these sums for the Miami Tribe, without interest. 26 Stat. 1000. The Miami Tribe here claim interest on these sums.

It is, of course, well established that interest against the United States cannot be recovered in the absence of express statutory or contractual provisions therefor, *United States* v. *Alcea Bank of Tillamooks*, 341 U.S. 48, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588, except when there is a taking which entitled a claimant to just compensation under the Fifth Amendment. *United States* v. *Alcea Bank of Tillamooks*, 341 U.S. at 49; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299.

The Miami Tribe argue here that the misappropriation of funds was a taking, for which, under the Fifth Amendment, they were entitled to receive interest as well as the principal.

The allotment by the Government or its agents of property rightfully belonging to an Indian tribe to some other party is a taking of that property for which the Indians are entitled to receive just compensation, which includes the payment of interest. *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476. *United States* v. *Creek Nation*, 295 U.S. 103.

But the Government says there was no "permanent appropriation of property for public purposes," as there was in the *Shoshone* case. What happened in *Shoshone* was that the Government had brought a band of Northern Arapahoe to the reservation of the Shoshone under military escort in 1878. No cession or "permanent appropriation" was made to the Arapahoe at that time, yet the Supreme Court held that the Shoshone were entitled to receive just compensation for the value of their property which had been "taken" in 1878. There was no less a taking here when the Government gave to persons other than Miami Indians property which rightfully belonged to the Miami.

Any failure to fully set forth this claim for interest in its pleadings before the Commission was remedied by the clear statement of the claim by counsel for the Miami Tribe at the beginning of the trial.[1] The Commission's own Rule of Procedure 13(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by motion of any party at any time, even after judgment; but failure to so amend does not affect the trial of these issues.

The Miami Tribe is therefore entitled to recover interest at the rate of 5% on the $18,370.89 from 1858 to 1891, and on the $43,600.14 from 1859 to 1891. This amounts to $100,072.19.

(5) WHETHER THE INDIANA MIAMI ARE ENTITLED TO SHARE IN THE RECOVERY FOR THE KANSAS LAND

The Indiana Miami claim that they should have shared in the payment which was made for the Kansas lands in 1854, and in the recovery granted in this proceeding of additional compensation for those lands. They argue that because they had been given permission by the tribe and by the United States to remain in Indiana, they could not and did not lose their membership in the tribe, and that since they remained members of the tribe they were and their descendants are entitled to share in the proceeds of the tribal lands.

The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana

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[1] "Now, there is still another claim that we have • • • and this again is solely a western Miami claim • • •

"In the year 1858 • • • the payment of annuities and the granting of land was authorized to certain people who were supposed to be Miamis and who, the evidence shows, were never Miami Indians at all. • • •

"[T]his was clearly a taking under the Constitution. It fulfills every requirement of a taking under the Fifth Amendment. • • •

"So the claim of interest from 1858 to 1891 • • •"

Mr. Miller (for defendant): "Could I ask a question there? • • • Is the only thing you are claiming there, which I have down as Issue 4 and which you are speaking of, the contention of interest on the amount that has been previously awarded from 1858?"

Mr. Rothschild (for petitioners): "That is correct, sir."

without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. *Eastern Band of Cherokee Indians* v. *United States*, 117 U.S. 288, 309–312; *The Prairie Band of Potawatomi Indians* v. *United States*, Appeal No. 2–57, decided July 16, 1958, 143 Ct. Cl. —, 165 F. Supp. 139 (slip opinion, pp. 12 and 20).

The Commission further found that these Miami united with the Miami who had tribal permission to remain in Indiana, and that this united group, by participating in and approving the treaty of 1854, recognized and agreed to a division of the tribal assets in which they accepted certain money, benefits and consideration and waived their claims to other tribal assets, including the Kansas lands. The appellant Indiana Miami dispute this conclusion, on the grounds that the representatives of the Indiana Miami who participated in making the treaty were not authorized to cede the Kansas land. We think that there is evidence that the Indiana Miami acquiesced in the cession as made. Although their representatives present at the treaty negotiations, and at the signing on June 4, 1854, may not have been authorized to cede the land, after the treaty had been signed a full council of the Indiana Miami was called and a delegation dispatched to Washington, D.C., to secure an amendment to the treaty provision relating to the method of payment for the commutation of annuities, in which they were to share. The entire treaty, including the provision that the Indiana Miami were to have no share in the payments for the Kansas land, implying that they had no interest therein, was before the Indiana Miami council at that time, and they made no objection to the land cession or to the implication of their lack of any interest in those lands. We conclude therefore that the Commission was correct in its conclusion that the Indiana Miami are not entitled to share in the recovery for the Kansas lands.

CONCLUSION

The judgment of the Indian Claims Commission is reversed. The Miami Tribe of Oklahoma (petitioners in

Docket No. 251 before the Indian Claims Commission) are entitled to recover $195,723.70 as additional compensation for the Kansas land which was ceded to the United States in 1854, $53,397.70 as additional compensation for the annuities which were commuted by the treaty of 1854, and $100,072.19 as interest on the sums due them as a result of the misappropriations of 1858 and 1859. The total recovery will be $349,193.59. The Indiana Miami (petitioners in Docket No. 124–A before the Indian Claims Commission) are entitled to recover $64,738.80 as additional compensation for their share of the annuities which were commuted in 1854. These cases are therefore remanded to the Indian Claims Commission for the entry of an order in accordance with these conclusions.

It is so ordered.

LITTLETON, *Judge* (*Ret.*), and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

This case is brought under the Indian Claims Commission Act on the ground that various acts of the Government in its dealings with the Indians were unconscionable or inconsistent with fair and honorable dealings. We said in *Sioux Tribe of Indians, et al.* v. *The United States*, Appeal No. 4–55 Ct. Cl. decided November 7, 1956, that an unconscionable consideration "is that consideration which is so much less than the actual value of the property sold that the disparity shocks the conscience. *The Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, cert. denied 342 U.S. 896 (1951)."

I do not think that the consideration paid the tribe under the 1854 treaty was so inadequate as to shock the conscience.

The Commission finds that the value of these lands was $1.25 an acre, but some of the Government's witnesses testified to a considerably lower value; one of them testified to 35 cents an acre, and another one to 50 cents an acre. Lands in that western country at the time of the 1854 treaty had a very uncertain value. It was difficult then, and it is much more difficult now, to determine with any degree of accuracy what those lands really were worth. The majority opinion says that what was paid the Indians was less than 50 percent of their value at $1.25 an acre, but what was paid

them was more than their value according to the testimony of both of the Government's appraisers. Under such circumstances, I cannot say that my conscience is shocked at the amount the Government paid.

I am more firmly of this opinion with reference to the commutation of annuities. A mistake may have been made in the commutation of these annuities, or there may have been no effort to compute them with accuracy, but the amount paid is by no means so out of line with the amount the court now finds their value to be, by meticulous computation, as to shock my conscience or to amount to conduct that was less than fair and honorable.

JONES, *Chief Judge*, joins me in the foregoing dissent.

APPENDIX B

Before the Indian Claims Commission

Docket No. 251

THE MIAMI TRIBE OF OKLAHOMA, ALSO KNOWN AS THE MIAMI TRIBE, ET ALS., PETITIONERS,

Docket No. 124–A

IRA SYLVESTER GODFROY, ET AL., ON RELATION OF THE MIAMI TRIBE, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: July 14, 1958

Appearances: Edward P. Morse, Attorney for Petitioners in Docket No. 251; Walter H. Maloney, Attorney for Petitioners in Docket No. 124–A; W. Braxton Miller, with whom was associated Mr. Assistant Attorney General Perry W. Morton, Attorney for Defendant.

OPINION OF THE COMMISSION

WITT, *Chief Commissioner*, delivered the Opinion of the Commission.

Dockets Nos. 124–A and 251 were consolidated as each presents identical claims involving the Miami Indian reservation in Kansas and the commutation of tribal annuities under the treaty of June 5, 1854, 10 Stat. 1093.

The petitioners in Docket No. 251 are descendants of those Miami who moved to Kansas after the treaty of November 28, 1840, 7 Stat. 582, and who now reside in Oklahoma. They claim they are the only Miami whose ancestors acquired an interest in the Kansas reservation, and that the Miami Indians of Indiana were not entitled to participate in tribal assets after 1846 except as specified in the Treaty of June 5, 1854, 10 Stat. 1093, and except for certain individuals who were entitled to draw a proportionate share of the tribal annuities in Indiana under the treaties of November 6, 1838, 7 Stat. 569 and November 28, 1840, supra. The petitioners in Docket 124–A are those Miami whose ancestors remained in Indiana when the tribe migrated to Kansas in 1846, and include descendants of Miami Indians who went to Kansas and later returned to Indiana. They assert they are part of the Miami tribe and entitled to share in its assets.

Both petitioners claim that the Kansas reservation contained fewer acres than were promised the tribe and that they are entitled to recover for this shortage; and that the consideration paid for that portion of the reservation ceded in 1854 was unconscionable. It is claimed that the commutation of tribal annuities in 1854 was unfair, and that defendant should be charged with interest upon funds diverted from the tribal annuities and upon the value of certain Kansas reservation land wrongfully allotted to non-Miami persons.

The defendant does not controvert the right of either petitioner to institute these actions and does not participate in the membership dispute between petitioners. It is agreed that the Kansas reservation assigned the Miami tribe in 1840 contained 324,796.88 acres; that the tribe retained 70,638.54 acres in 1854 and ceded 254,158.34 acres to the United States.

The issues presented at this time may be said to be: (1) Did the Miami Indians residing in Indiana after 1846 have an interest in the Kansas land; (2) Was the consideration paid in commutation of annuities unconscionable; (3) May the petitioners recover interest on principal sums refunded to them on March 3, 1891, 26 Stat. 1000, on account of allotments and payments granted to spurious or unqualified Miami Indians; (4) Are petitioners entitled to recover because of a shortage of acres in the Kansas reservation, and, (5) Was the consideration paid for the acreage ceded to the United States in 1854 unconscionable?

Ownership of the Kansas Reservation

We shall first consider what, if any, interest the petitioners in Docket No. 124–A acquired in the Kansas land.

It is evident that the tribal unit with its inherent power and authority moved to Kansas in 1846, although its membership is not known. An additional 61 individuals migrated in 1848, leaving about 100 Miami Indians then in Indiana. Upon the tribe suffering a heavy numerical loss due to illness, many individuals returned to Indiana, and these, together with those who had remained in that state totaled 302 in 1854 as compared to 248 who then resided in Kansas.

According to the Miami treaties of 1838 and 1840 and the representations of the tribal delegation in Washington during 1854, only three families had tribal permission to remain in Indiana after the tribe moved to Kansas. These were the family of Chief John B. Richardville, whose health prohibited him from embarking upon the western journey, the family of Chief Francis Godfroy who was then deceased and

whose property could not be sold until his youngest child reached the age of 21 years, and Me-shing-go-me-sia and his brothers. Nor does it appear that this separation was intended to be permanent. It was a tribal custom to award land grants to members for meritorious services rendered to the tribe. These grants were ordinarily quickly converted into cash for wider distribution by the grantees, and both Richardville and Godfroy had received title to a number of acres in this manner. The treaty commissioner's reports and the treaty terms clearly imply the departure of the Richardville and Godfroy families awaited only the death of Richardville which occurred in 1841, the maturity of the Godfroy children and the sale of their respective lands. The 1840 treaty provided that the reservation set aside in 1838 for Ma-to-sin-ia's band should be patented in trust to his son, Me-shing-go-me-sia, and the treaty commissioner's report stated that some of the Ma-to-sin-ia band might remain upon this reservation, but that their eventual removal was to occur, we think, is a logical conclusion to be drawn from the fact that no provision was made for payment of tribal annuities to them in Indiana after the tribe moved to Kansas.

Since the 1840 treaty expressly committed the tribe to move from Indiana to Kansas, those members refusing to accompany it and who did not have the tribe's consent to remain in Indiana, and those who moved with the tribal unit to Kansas but later returned to the State of Indiana, separating themselves from the tribe, and having no further participation in the tribal consultations of transactions, must, we think, be held in accordance with previous decisions of this Commission, to have deliberately severed their tribal relationship and to have lost the accompanying right of participation in tribal assets. *Prairie Band*

of Potawatomi Indians vs. *United States*, Docket 15–J, et al., 4 I.C.C. 473. This group also included those 34 persons who Congress by Joint resolutions directed be paid a proportionat share of the Miami annuity funds, but who were not recognized by the tribe in Kansas or by the Miami Indians in Indiana as being Miami Indians and entitled to participate. The record indicates that all of the Miami Indians in Indiana subsequently united, and that they have conducted themselves, as a unit, and as independent of the tribal entity.

This separation of the Indiana Miami from the tribe and the termination of their interest in the tribal land in Kansas seems to have been recognized and acquiesced in by both the Miami in Indiana and the Miami in Kansas at the time of the negotiations in 1854 which terminated in the treaty of that year. The Miami tribe and those Miami Indians having tribal consent to live in Indiana had each complained that the tribal annuities were being paid to persons who were not entitled thereto. Five headmen of the Indiana group came to Washington in May, 1854, to discuss this matter with the Commissioner of Indian Affairs, and to meet with and discuss it with a delegation of the Kansas Miami or the "Western Miami" as they were called which was then in Washington and authorized to negotiate a cession of the Kansas land. Under the supervision of the Commissioner of Indian Affairs and these representatives of the Indiana group, a list of 302 persons as representative of all those of Miami blood residing in Indiana and entitled to participate in tribal annuities was prepared and attached to the treaty of June 5, 1854, when it was submitted to the Senate for ratification. Petitioners in Docket 124–A deny that they are bound by this treaty, asserting that

the Miami Indians in Indiana never approved, agreed to, or authorized the execution of it, although they accepted the attached list as correct and received their share of the commuted funds according to that list. We think they err in contending this treaty was not binding on them, for it was executed by an authorized representation of the Miami tribal unit and if petitioners in Docket 124–A were a part of that unit, as they allege, they were necessarily bound thereby.

It is quite clear, however, that the Indiana residents approved and participated in this treaty entirely as a separate and distinct unit apart from the Miami tribe. The preamble (Pet. Ex. 36, p. 175, Dkt. 251) to the 1854 treaty sets out as the negotiating parties the Commissioner of Indian Affairs representing the United States, and five duly authorized delegates representing the Miami tribe in Kansas. There are then listed five additonal persons who are described as "Miami Indians, residents of the State of Indiana, being present, and assenting, approving, agreeing to and confirming said articles of agreement and convention."

The first three articles provide for the cession of the Kansas land; reserve 70,640 acres of it, and specify its future dispositon; set out the consideration and manner of payment agreed upon and specifically provide that no part of the money payable under that article of the treaty or arising in event of the subsequent sale of any of the reserved land should ever be paid the Indiana Miami; limit the allotments provided for to Miami Indians "now residing on said lands". The 4th, 5th, and 6th articles deal with the commutation of annuities. As the treaty was worded when originally executed, Article 4 provided that if the Indiana Miami so desired, the

United States would retain their proportionate share of the principal fund resulting from such commutation, $231,004, and pay them an annual interest, and their representatives agreed to submit this proposition to their people for consideration, with their decision thereon to be immediately conveyed to the Commissioner.

The evidence of record discloses that the Indiana Miami thereafter met in open council and that the same five individuals who signed the treaty on their behalf were thereafter dispatched to Washington to represent the Indiana Miami in reference to the treaty which was then pending ratification. It was at the request of the delegation that Article 4 was amended to provide for the United States to retain said $231,004, at annual interest 25 years and to make disbursement of the accruing interest and eventually the principal to only those persons whose names appeared upon the corrected list of June, 1854, and their descendants, unless other persons were added to that list "by the consent of the said Miami Indians of Indiana, obtained in open council". The Senate also inserted a paragraph in Article 4 finding the delegation was a duly authorized deputation of the Miami Indians of Indiana and, as so amended, the treaty was ratified in August of 1854.

There is no direct evidence of the full powers which were granted to the second delegation from Indiana, but we believe it is quite unlikely it would have been given anything less than full authority to represent the Indiana Miami in all aspects of the pending treaty which was of vital importance to them.

The treaty clearly refutes their present claim of interest in the Kansas land, and we think the Indiana Miami are bound by it; that by assenting to and participating in it, they divided the tribal property with

the Kansas unit and that such action amounted to a recognition upon the part of the Indiana Miami that they possessed no interest in the Kansas land.

The defendant had no interest in the settlement of any claims of the two petitioner groups which were wholly against each other. It accounted according to the division agreed upon by them. There is no evidence of fraud, duress, undue influence or coercion upon the part of the defendant or any benefit to be derived by it from a division of the tribal assets between the petitioners; that petitioners did not understand the effect of the treaty provisions; or any good reason why the division of the property rights as provided by the 1854 treaty should be disregarded. It follows that the petitioners in Docket No. 124–A have no interest in any claim which is based upon a claimed interest in the Miami reservation in Kansas.

Commutation of Annuities

All parties are agreed that the annuities commuted in 1854 for the sum of $421,438.68 represented a $25,000 cash annuity established in the treaty of 1826, and other annuities of merchandise or labor having the following actual cost:

$320	salt per treaty of 1805, 1818
770	iron, steel, tobacco per treaty of 1826
200	agricultural aid per treaty of 1818
250	laborers per treaty of 1840
$1,540	

Defendant has not denied the validity of these obligations, but it claims that the 1826 treaty which limited the $25,000 annuity to "as long as they (the Miami) exist together as a tribe" makes it less than a perpetual annuity and consequently reduced its cash value in 1854.

The parties agree that the present value of an annuity is that sum necessary at current interest rates to annually produce the amount of the annuity. Petitioners say, however, that in arriving at the present value of these annuities as of 1854, six per cent per annum rather than five per cent per annum would, over some periods, more accurately reflect the varying rates of interest. Interest rates have been consistently applied at five per cent per annum prior to 1934 and at four per cent per annum thereafter when interest has been used as a measure of just compensation in these Indian suits against the Government, and we see no good reason for departing from these recognized rates which were fixed by the Court of Claims after an exhaustive examination into the history of interest rates. *Shoshone Indians* vs. *United States*, 85 Ct. Cls. 313, 380; *Alcea Band of Tillamooks* vs. *United States*, 115 Ct. Cls. 463, 518; *Yakima Tribe* vs. *United States*, 5 I.C.C. 630, 660. On this basis the present cash worth of a permanent annuity of $26,540 is $530,800.

It is true that Article 4, Treaty of 1854, recites that the $421,438.68 stipulated to be paid is in commutation of these annuities and in satisfaction of all claims or damages on account of non-fulfillment of any treaty terms or for injuries or damages to, or loss of property due to wrongful acts of citizens or agents of the United States. There is nothing disclosing what, if any, claims were presented or agreed to by the parties, and we must assume the $421,438.68 represents the consideration paid for the commutation. However, that is not all the Miami received, for by the next article it was stipulated the defendant should pay the $25,000 annuity in 1854 and in 1855. So, what the Miami actually received was $471,438.68 for a release of an obligation having the present cash value of $530,800, if the annuity of $25,000 is considered on a perpetuity.

We can not say that an annuity which is terminable upon a future contingency, however improbable that contingency may be, is permanent in its nature, and it follows that its value is something less than that of an annuity in perpetuity. We do not believe, however, that it is necessary to the final determination of this matter that we attempt to fix upon any definite figure as representing the 1854 value of this $25,000 annuity.

It is evident that none of the parties participating in the commutation negotiations contemplated the perpetual existence of the Miami tribe. More than half of the Miami Indians then living were no longer tribal members, and those who were members were taking allotments of the tribal land as quickly as it could be surveyed and their selections made, with all excess acreage in the 70,640 acres reserved for this purpose to be sold and the proceeds divided upon request of a majority of the tribe. Undoubtedly the individual members considered it more beneficial under these circumstances to receive their proportionate share of the agreed consideration (which would be some $850) during this time, than an annuity of approximately $48 per person indefinitely.

Whatever may have been the controlling inducement, there is no evidence of over-reaching, of fraud, duress, coercion, or misunderstanding. In satisfaction and release of a claim of indefinite value, the parties agreed upon a specific sum which was forthcoming at a time when the tribe was passing from a communal mode of living to that of individual allotments and was faced with the expense incident thereto. Under the circumstances disclosed, we can not say that the $471,438.68 consideration was unfair or dishonorable, or that it fell so far short of the true value of the annuities commuted as to be unconscion-

able. The petitioners may not recover upon their claims arising out of the commutation of annuities under the Miami treaty of 1854.

The Interest Claims

Petitioners have submitted Proposed Findings for an award of interest computed upon funds wrongfully diverted from annuities due the Miami Indians and paid under Act of June 12, 1858, 11 Stat. 329, 332 to non-Miami individuals, and upon the amount paid by defendant as compensation for certain allotments of reservation land made to such non-Miami persons under that Act. Under a proposed finding denying recovery on the ground that the allotments and disbursements were wrongfully made under apparent mistakes of law and fact but did not involve a taking or appropriation for public purposes under the Fifth Amendment, defendant cities as supporting evidence that the claim pleaded in Docket No. 251 is not based upon that amendment, and is not specifically pleaded at all in Docket No. 124–A.

We are unable to find any pleadings on the part of the petitioners in either Docket 251 or 124–A whereby claim is made for interest based upon an alleged taking or appropriation for public purposes under the Fifth Amendment. As a matter of fact, it is difficult to construe any of the allegations of liability on the part of the defendant which appear in either petition as alleging a claim based upon failure to pay interest, although Section 7 of the Commission's Rules of Procedure requires a clear presentation of all claims being asserted.

In their briefs petitioners do not refer to any language in their respective petitions as covering a claim for interest, nor do their requested findings refer to

any language in the petitions under which their right to interest is asserted.

In any event, even if the language in the petitions may be construed as making a claim for interest, the facts show only a misapplication of funds and an erroneous assignment of allotments. They do not, in our opinion, show a constitutionally appro d appropriation of property for public purposes. Restitution of the funds and payment of the determined value of the land at the time of its allotment are shown to have been made. Congress has never authorized the payment of interest in either instance, and the Commission is without authority to grant an award for interest resting upon such facts as are shown.

Alleged Shortage of the Kansas Reservation

The petitioners contend that the defendant promised them in 1840 as many acres in Kansas as the tribe ceded by the 1840 treaty or, in any event, 500,000 acres, and that the tribe was placed in possession of but 324,796.88 acres in Kansas. A cursory examination of the 1840 treaty discloses the Kansas land was not part of the recited remuneration for the 1840 cession; nor is it so presented by the petitioners in Docket 124 A in their companion case, Docket 124-F wherein they seek additional compensation for the Indiana land, and Mr. Rothchild, Attorney for the Petitioners in Docket 251, stated during final argument before this Commission on April 9, 1958 (Trans. p. 462):

> In other words, the consideration for the Big Reserve was money; the consideration for moving West was the Kansas land. This was earned when the tribe moved West, and it was earned by those who moved west.

So petitioners seek to recover the difference between the acreage allegedly promised in consideration of the tribe moving west, and the actual acreage assigned to it, computed at a sum per acre equal to the average per acre value of the Kansas land when it was ceded to the United States in 1854. Clearly this claimed shortage or taking was known before 1854 and could have occurred, if at all, only when the tract was assigned to and accepted by the Miami in 1841, at which time the tribe approved the amended treaty. It could represent only land contiguous to the 324,796.88 acres received by the tribe and lie on one or more of the north, south or western sides of that acreage. Passing, however, the fact that no evidence has been presented concerning the 1840 or 1841 value of any land in Kansas, and the difficulty of fixing a value on any tract so indefinite of location, we reach the problem of how much land the Miami were entitled to receive in Kansas.

The defendant first approached the Miami seeking to secure the tribe's removal from Indiana in 1833. It was not until 1838, however, when Chief Richardville expressed his concern that the tribe was surrounded by white settlements and that its removal was necessary if it was to remain extant, that the Miami evinced any interest in moving west. The tribe made no firm commitment but in the treaty of that year it agreed to send a delegation at the Government's expense to explore the western country, where the defendant promised "to possess, the Miami tribe of Indians of, and guaranty to them forever, a country west of the Mississippi river, to remove to and settle on, when the tribe may be disposed to emigrate * * * sufficient in extent and suited to their wants and condition, and * * * in a region contiguous to that in the occupation of the tribes * * * from the

States of Ohio and Indiana". The record does not indicate whether this delegation had explored the land here involved or any other western land before the tribe agreed in 1840 to move within five years to the country assigned to it in the west, or when it accepted the land selected for its future home by its approval in May, 1841, of the Senate Amendment to the 1840 treaty which amendment designated the particular tract here involved as the tribe's future home.

An agreement calling for a specific acreage of western land is not indicated by the evidence. A westward migration was not considered at all in 1833 or 1834 and the fact that the 1838 and 1840 treaties each fail to describe the western land as a 500,000 acre tract or as equivalent in area to the acreage being ceded in Indiana, instead of the much more lengthy and more general description of the country promised to the tribe which the 1838 treaty specified should be within a certain region and suitable in area for certain purposes, is strongly indicative that there was no agreement that the western tract should contain any specific acreage. When the Senate, by inserting Article 12 in the 1840 treaty, tendered the tribe a specifically described tract, which tract met with these specifications and the Miami tribe accepted that tract by approving the amended treaty after the effect of such action upon their part had been explained to them, the tribe must be said to have accepted the described tract. That it ceded some 254,000 acres of such tract in 1854 and thereafter continued to reside upon 70,638.54 acres of it is an effective argument that the Kansas land was "sufficient in extent, and suited to their wants and conditions." That the tract was within the region designated is not disputed. That the United States did not guarantee it to contain a definite acreage is established by the use of

the word "estimated" in Article 12, and that the Miami tribe understood this is evidenced, we think, by the fact that no complaint was made of the size of the tract when the tribe went into possession and none was presented until negotiations were pending for the sale of a part of the land in 1854.

From the several reasons stated we think the Government promised the Miami tribe an indefinite location in the west; that in 1846 it offered the tribe a particular tract and the tribe accepted that tract as meeting its specifications for a country within the region occupied by other Indian tribes from Indiana and Ohio, and sufficient in size for its wants. It is evident that the Kansas reservation met these requirements.

There appears to be no basis here for a recovery on the grounds of unfair and dishonorable dealings. The movement of the Miami into Kansas was beneficial to the United States who desired to free Indiana from the presence of the tribe, but it was also essential to the welfare of the tribe that it move from its location within a ring of white settlements. By purchasing the tribal land within this unsatisfactory area and by placing the tribe in possession of a tract within a region preferred by it and containing 254,000 acres more land than sufficient for its wants (as evidenced by the subsequent cession), we think defendant fulfilled every requirement of fair and honorable dealings.

1854 Value of the Kansas Land

The Miami tribe contends that the land ceded on June 5, 1854, had a reasonable value of $2.40 per acre ($609,989.00) and that it received an actual consideration of $121,974.23. Defendant values the land on June 5, 1854, at from 35¢ per acre ($89,035.42) to 50¢ per acre ($127,079.17), and claims a consideration

paid of $200,000. This variation in the amount of consideration claimed to have been paid results from the defendant using the consideration recited in the treaty, whereas petitioner tribe has treated the installment payments as an annuity which it has commuted back to the treaty date. The propriety of its action in so doing becomes material when determining whether the consideration paid was unconscionable.

In *Miami Tribe* vs. *United States*, Docket 67, the United States was permitted to offset against an award based upon the Miami treaty of 1818 only the sum of the commuted value of certain annuities forming a part of the treaty consideration instead of the total sum it had paid out to meet the annuity obligations. However, we do not find that situation analogous to the one before us. There the annuity promises were the consideration for the cession, and it was necessary to determine the value of those promises as of the date they were made. Here the consideration is clearly stated: $200,000. Whatever arrangement was agreed upon concerning the method of its payment, that sum was the consideration passing between the parties, and upon its payment the obligation was satisfied according to the treaty terms. The fact that the greater portion was paid in installments did not convert the installment payments into an annuity, and to so treat them would in effect constitute an interest charge when the treaty is silent in that respect. *The Croe Tribe* vs. *United States*, 6 I.C.C. 98. Receipt of payments totaling $200,000 is not denied, and we turn to a consideration of whether that sum approximately represents the fair and reasonable value of the Miami land.

This value is to be determined as of June 5, 1854, the treaty date, for it is a principle of international law which has been applied to treaties or agreements

between Indians and the United States, where individual rights are not involved, that when the instrument is silent as to the time it shall become operative the rights of the parties relate back to the date of signing and not to the date of ratification, unless the instrument provides otherwise in which event the stated terms control. *Coeur d'Alene Tribe* vs. *United States, Dkt.* 81, I.C.C. 38, 46.

The parties hereto each rely upon information contained within the original survey notes of 1856–57 as a basis for the classification of the Miami tract. Those notes disclose the reservation was classified at that date as 13.3% Class I land, 65.7% Class II and 21% Class III. Class I was bottom, terrace, and upland, having 2% or less slope, with alluvial and dark residual prairie soil. Class II encompassed the present-day Soil Classifications of the United States Governmental Departments of Classes V, VI, and VII, having slopes up to 12%, and dark residual prairie soil over a clay subsoil. These four soil types are all good agricultural lands and under the climatic conditions prevalent in eastern Kansas are well suited to the growing of small grains. Class III is land unsuited for agriculture, but produces a good prairie hay. There was a 40% overall timber coverage of walnut, hickory, elm, sugar maple and other hardwoods on the uplands with sycamore along the streams. Within the tract, exclusive of the 70,638-acre reserved area, this coverage dropped to 15%. The land is drained by the Osage River and its tributaries, which generally flow south and southeast through the tract. There is some flood history along the Osage within a limited distance of the stream. Limestone outcroppings are found in the southeast quarter of the reservation. Iron ore, coal and tar springs (indicating the possible presence of petro-

leum) were noted by the surveyors as present throughout the entire tract but there is no evidence that either contributed to the land values.

Timber and limestone were considered attractive as materials for the construction of crude homes and fences but in 1854 possessed no value apart from the land. The highest and best use of this land was for small-farm agriculture, and a timber site with adjacent prairie was considered preferable.

Clearly the present instance is one where our valuation can not rest upon market value alone for the size of the tract and its location in the unsurveyed Indian country, limited any immediate purchaser to the United States Government. In the absence of an ordinary market value, we must turn to a consideration of other factors which demonstrate a present or potential value and thereby establish a basis of evaluation. Our findings of fact are therefore somewhat voluminous. They are designed to cover all factors influencing value, such as soil, climate, classification of land, natural resources and economic or potential value; water, rail, and wagon transportation systems; population; economic conditions and potential agricultural use. We have also given careful consideration to the testimony of the expert witnesses which were called by both parties hereto.

On behalf of the petitioner Ida Fox testified concerning historical documents and events prior to 1857 and Professor John Long testified concerning information found in the notes of the original survey run of the Miami reservation and of the Peoria trust lands, a 208,585.69-acre tract adjoining the original Miami reservation on the north. Neither witness placed a monetary value on the Miami land but petitioners rely primarily upon Mr. Long's testimony of comparability between the Miami and Peoria land and

the sales history of the Peoria land to establish a value for the Miami tract under the conditions prevailing as testified to by Miss Fox. Defendant's witnesses, Richard B. Hall and Dr. William Gordon Murray, had also studied the notes of the original survey run of the Miami tract as well as those covering the survey of a 350,000-acre tract in Missouri adjacent to the Miami land, and taking into consideration the rate of transfer of the Missouri land, comparability of the tracts, state of development, economic conditions and other factors, Dr. Murray valued the Miami land ceded in 1854 at 50¢ per acre as of 1854. Mr. Hall's valuation of 35¢ per acre was based upon the fact that similar and contiguous land in Missouri had been on the market for years at $1.25 per acre; that a hypothetical purchaser would have considered himself entitled to 25% profit because of time involved in realizing upon his investment; would need consider 25% of the land must be given away to finance transportation facilities and internal improvements, that 25% would go to advertising, sales promotion and carrying expense; and 25% would remain to care for the original purchase. He did not estimate the time necessary to complete the disposal program. Factors contributing to his net valuation included the Graduation and Military Bounty Acts, neither of which was in existence on June 5, 1854. However, since legislation similar to the Graduation Act had long been pending, a prospective purchaser would have been aware of the probability of this or similar legislation being enacted. The Military Bounty Act of 1855 increased the supply and made military warrants assignable but both warrants and script had been in existence since 1820. The value of opinion evidence, as we said in *Miami Tribe* vs. *United States* (4 I.C.C. 436), depends upon the qualifications of the witness, the correctness

of the facts upon which opinion evidence is based and whether all relevant factors have been taken into account.

Evidence concerning the so-called Peoria trust land (that land ceded by the Kaskaskia, Peoria, Piankeshaw and Wea tribes in 1854 for sale by the United States on behalf of the Indians) is that it was 208,585.69 acres in size, adjoined the Miami reservation on the north, was very comparable to the Miami tract in climate, soil, topography, timber coverage, best potential use, want of mineral values and lack of improvements. It lay between the Miami tract and the town of Kansas City and was hence nearer to Kansas City and to Leavenworth than the Miami land; the Fort Leavenworth-Fort Scott Trail also crossed its eastern edge and the Santa Fe Trail ran within a few miles of its northwest corner. It was surveyed in 1856 and appraised at an average $1.66 per acre. All but 700 acres sold in small tracts at public sale within a period of less than a month in 1857 for an average $1.67 per acre. The tracts not claimed by pre-emptors at $1.25 per acre brought generally $3.00 per acre.

Petitioners also point out that in 1857 pre-emption claims in the Miami reservation were reputedly bringing $5.00 to $7.00 per acre near Sugar Mound within the Sugar Creek valley, and that claims within the Osage River valley brought $1.25 to $3.12 for prairie land and $1.87 to $6.25 per acre for timber land; that Iowa trust land, along the Kansas-Nebraska state line, sold for an average of $2.35 per acre in June, 1857; Delaware trust land within 50 miles of the Miami tract, including much land in the valleys of the Kansas and Missouri rivers, sold for an average $2.00 per acre in 1867 when pre-emption purchasers and combines of speculators were reported to have acquired the land for less than the

free market value. A 2,571-acre tract of well-timbered land, within an area where timber was scarce, sold to the Christian Indians in 1854 for $2.50 per acre. There is no comparability as to size between either of the small-tract sales or the Christian Indian tract and the 254,158.34 acres under consideration. There is no soil, topography or stream data concerning any of these lands for comparison use, but the Christian Indian tract lay within two miles of Leavenworth, the most rapidly developing community in Kansas where agricultural produce had a market. The chief commercial road to the west bisected the tract, and it could be expected that rail transportation would soon follow it westward, whereas the Miami tract was 45 miles from the closest settlement in Kansas, was serviced by a dirt road over which transportation was difficult, and there was no apparent reason to expect railroad service within its vicinity in the near future.

The relative size of the tracts and the sale dates require consideration when these respective sales are compared with the Miami tract. It is the 1854 value of the entire Miami tract that we must ascertain and not the total of the values of the innumerable smaller units into which it may be divided. A 160-acre tract, as the trust lands were offered for sale, is usually purchased for a home, but a 254,000-acre purchase becomes a speculation, with the purchaser confronted with the expense of financing, surveying, advertising, carrying expenses, the sure knowledge that the land will be picked over and culled by the first of his purchasers, and that an indefinite time will pass before he will realize a return or profit from his investment, whereas a quicker and more certain return and profit could be derived from negotiable paper or other investments.

Petitioners also point out that in 1891 the Court of Claims, upon a question submitted to it by a Congressional Committee, certified to that Committee its finding that 14,533.38 acres within the 70,638.54 acres reserved in 1854 by the Miami Indians had an average value in November, 1859, of $3.00 per acre.

The unexpectedly rapid settlement of eastern Kansas, its early attainment of statehood, and its corresponding economic development, its increase in population and the roads, markets and railroad facilities developed during the next decade, are all elements of hindsight which were not available to a prospective purchaser of the Miami land in 1854, yet each contributed to a much higher market for the Kansas land in 1859 than existed in 1854.

Taking into consideration the fact that 85% of the Miami land sold to the defendant was without timber, that a vast amount of public land was available in the United States and particularly within the adjoining State of Missouri, and the vast acreages in Kansas which had been ceded to the United States outright or in trust by the Delaware, Shawnee, Iowa, Sac and Fox, Kickapoo, and the United Tribes of Kaskaskia, Peoria, Piankeshaw and Wea, immediately prior to the Miami purchase, which land a prospective purchaser could expect would appear on the market in small units within the immediate future, and such other elements bearing upon value as appear from the entire record, with due consideration being given the reasonings and conclusions of the expert witnesses, it is our conclusion that on June 5, 1854, the 254,158.34 acres of Kansas land ceded by the Miami Tribe to the defendant were reasonably worth $1.25 per acre or $317,697.93.

The question next arises: Does the payment of $200,000 or .7867¢ per acre for land worth $1.25 per

acre or $317,697.93, being about 63% of its value, constitute an unconscionable consideration?

Webster's New Collegiate Dictionary defines "unconscionable" as: "1. Not conscionable; unreasonable; as, an unconscionable charge. 2. Not guided or controlled by conscience; unscrupulous; as, an unconscionable rascal." Webster's International Unabridged Dictionary also likens it to "outrageous", "egregious", and "exhorbitant". Black's Law Dictionary defines an unconscionable bargain as "A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other", and cites the case of *Hume* vs. *United States*, 132 U.S. 406, 10 Sup. Ct. 134, 33 L. ed 393.

It appears that there is no hard and fast rule for determination of what is or is not an unconscionable consideration. The sole criterion is whether or not the consideration is so out of line with the true value of the property as to "shock the conscience". The Supreme Court said in *Klamath and Modoc Tribes* vs. *United States*, 286 U.S. 244, when considering whether a release was invalid which was granted for less than four per cent of the value of the land involved:

> Even if judicially cognizable, as would be a like contention in ordinary litigation between individuals, plaintiff's insistence that inadequacy of consideration invalidates the release could not have been sustained. That is so because the findings fail to show that any person acting for the United States deceived or misled plaintiffs as to the value of the land or, indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release. Mere inadequacy of consideration is not enough. * * *

Payment of less than half the true value appears to be unconscionable. 3 Pomeroy's Equity Juris., (5th ed., 1941), p. 637; *Butler* v. *Miller*, 1 Ir. Eq. 195, 211, 15 W.R. 779; *Mussleman* v. *Knott*, 7 Ky. L. Rep. 380. Yet the courts have fixed no exact division line and what one person may think unconscionable, another may well consider otherwise. The present record does not indicate that petitioners were deceived or misled by defendant as to the value of the land, or that any fact bearing upon its value was withheld from them, that the delegation did not fully understand the effect of its action, or was lacking in freedom of action. Nor is there proof that the tribe was so destitute and suffering such financial embarrassment as to place it at the mercy of defendant during the treaty negotiations. Under the circumstances we do not think an unconscionable consideration has been established within the meaning of the Indian Claims Commission Act. (*Osage Tribe* v. *U.S.*, 119 C. Cls. 592; *Otoe and Missouria* v. *U.S.*, 131 U.S. 393.)

Petitioners have plead alternatively under Section 2 (5) of the Act. In order for the transaction to be unfair and dishonorable and entitle petitioners to relief under this section, some mistreatment must exist other than mere inadequacy of price. When relief, if granted, must be based upon inadequacy of consideration alone, such inadequacy must be such as may be characterized "unconscionable". The Commission is of the opinion that the facts and circumstances shown here disclose no ground for relief other than an inadequacy of consideration which in itself alone falls short of the requirements of our Act for

the granting of relief. Wherefore petitioners' prayer in this respect must be denied.

(S) EDGAR E. WITT,
Chief Commissioner.
(S) LOUIS J. O'MARR,
Associate Commissioner.
(S) WM. M. HOLT,
Associate Commissioner.

APPENDIX C

Article 4 of the Treaty of June 5, 1854 (10 Stat. 1095–1096):

> 'It is agreed that the remaining instalments of the limited annuity of twelve thousand five hundred dollars, stipulated to be paid by the second article of the treaty of November twenty-eighth, one thousand eight hundred and forty, shall be divided and paid to the said Indians thereafter as follows: to the Indiana Miamis, six thousand eight hundred and sixty-three dollars and sixty-four cents, and to the Western Miamis; five thousand six hundred and thirty-six dollars and thirty-six cents, per annum; subject, however, to the deductions provided for in the sixth article of this instrument; and that the permanent annuity stipulated in the fifth article of the treaty of October sixth, one thousand eight hundred and eighteen, as modified by the fifth article of the treaty of October twenty-third, one thousand eight hundred and thirty-four, for a blacksmith and miller, shall be continued for the benefit of said Western Miamis; but the said Miami Indians hereby relinquish and forever absolve the United States from the payment of the permanent annuity of twenty-five thousand dollars, stipulated in the fourth article of the treaty of October twenty-third, one thousand eight hundred and twenty-six, of the permanent provisions for money in lieu of laborers, for agricultural assistance, for tobacco, iron, steel, and salt, and from the payment of any and all other annuities of every kind or description, if any there be, to which said Indians may now be entitled by virtue of the stipulations of any former treaty or treaties; and they also release and discharge the United States from all claims or damages on

account of the non-fulfilment of the stipulations of any former treaties, or of injuries to, or destruction or loss of property by, the wrongful acts of citizens or agents of the United States or otherwise; and in consideration of the relinquishments and releases aforesaid, the United States agree to pay to the said Miami Indians, the sum of four hundred and twenty-one thousand four hundred and thirty-eight dollars and sixty-eight cents, in manner as follows, viz: one hundred and ninety thousand four hundred and thirty-four dollars and sixty-eight cents, to the Miami Indians residing on the ceded land; and two hundred and thirty-one thousand and four dollars, to the Miami Indians in the State of Indiana; to be paid under the direction of the President, and in such manner and for such objects as he may prescribe, in six equal annual instalments, the first of which shall be paid in the month of October, one thousand eight hundred and fifty-four. And in full payment and satisfaction of a balance of eight thousand dollars and sixty-eight cents, heretofore appropriated by Congress to pay for the valuation of certain improvements, or to make others in lieu of them, but which, not having been expended, has gone to the surplus fund; and of the accumulation of the appropriations for the support of the poor and infirm, and the education of the youth of the tribe, as provided by the treaties of October twenty-third, one thousand eight hundred and twenty-six, and November sixth, one thousand eight hundred and thirty-eight, amounting to fourteen thousand two hundred and twenty-three dollars and fifty cents; and of the claims of the Miamis who live on the ceded land, for damages and loss of stock and other property, caused by their removal west, and their subsequent loss by removal from Sugar Creek—it is agreed that the United States will pay to the Miami Indians residing on said ceded lands, the sum of thirty thousand

dollars, to be paid as follows, viz: fourteen thousand two hundred and twenty-three dollars and fifty cents, in three equal annual instalments, the first which shall be paid in the month of October, one thousand eight hundred and fifty-four; and the sums of eight thousand dollars and sixty-eight cents, in lieu of the improvement money referred to, and seven thousand seven hundred and seventy-five dollars and eighty-two cents, being the residue of said amount of thirty thousand dollars, shall be paid immediately after the requisite appropriation shall have been made: *Provided,* That the said sum of eight thousand dollars and sixty-eight cents, shall be paid to the persons who are entitled to the same, as far as they may be practicable; and the seven thousand seven hundred and seventy-five dollars and eight-two cents shall be paid to such of the Miamis west as have lost stock or other property by wrongful acts of citizens of the United States, while in the Indian country, and to those who were injured by the loss of improvements in their removal from Sugar Creek to their present home. The claimants, in all cases, to file their demands with the chiefs within six months after the ratification of this instrument; and if the aggregate sum of the lawful claims exceeds the amount of the fund, the claims shall be reduced by a uniform rule, so that each claimant shall receive his pro rata; but if it fall within the amount of said fund, the excess shall be paid to the tribe as annuities are paid. Any person aggrieved by the decision of the chiefs may appeal to the agent: *Provided, however,* That if the Miami Indians of the State of Indiana desire it, and notify the Secretary of the Interior of that fact, he will cause the said sum of two hundred and thirty-one thousand and four dollars to be invested for them in safe stocks, and pay over annually to said Indians the interest arising

from such investment, and the said Miami Indians now present from the State of Indiana, agree to take the opinion of their people on their return home, and advise the department without delay.*

*See amendments, *post*, p. 1098, 1099.

seems irrefutable that, in the light of the testimony of defendants' witnesses, who stand unimpeached, and the general situation shown by the evidence, just compensation has not been awarded the owners for what is being taken away from them in this action, and that if the judgment under review is permitted to stand, the owners-defendants thereby, and by the rulings and findings adverse to them, have been denied Due Process of Law, the Equal Protection of their Laws, and, since Magna Charta (Runnymede, 1215), their property and the possession, use and enjoyment thereof wrested from them, in violation of the Law of the Land;—and an "American's house is no longer his castle," and his temple is gone.

It is respectfully submitted that, in each of the points raised in the Questions Involved the Court erred, to the manifest injury of the defendants-appellants and in contravention of their fundamental legal and constitutional rights aforesaid.

The general situation in eminent domain differs from that which is ordinarily involved as between parties. Here the Crown is wresting from the citizen his castle. For centuries the law by which we are governed has been administered in protection of the citizen from the arrogance of the Crown, a tyranny which is fostered inevitably by being "Clothed with a little brief authority," unless kept in reasonable restraint, and this restraint of the Crown is our Country's proud claim through its Constitution. Here the defendants had lived and labored from birth. Emotion is bound to enter in and become a force that should be considered. Our forefathers fought, bled, sacrificed their private fortunes, and died, so that those sacred rights should be preserved against the ruthless invasion of the Monarch.

This is the picture which eminent domain presents. But the representatives of the State often disregard it and base their assertions upon legal technicalities and sophistry; and the jury, unlearned in this philosophy, wonders, perhaps, what it all means and seeks its own channel, in utter disregard of the evidence produced before it.

Such is the picture here.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari be granted.

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